

APPEAL NO. 021076
FILED JUNE 24, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 3, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that he timely filed a claim for compensation for his compensable injury of _____; that the appellant (carrier) waived the right to contest the compensability of the claimed injury of _____, by not timely or adequately contesting compensability; and that the claimant had disability from October 9, 2000, through November 16, 2000, and again beginning July 3, 2001, and continuing through the date of the CCH. The carrier appealed, arguing that the hearing officer's determination is against the great weight and preponderance of the evidence. The claimant filed a response urging affirmance.

In addition, (Employer A), in a letter dated May 3, 2002, addressed to the Texas Workers' Compensation Commission (Commission), "C/O Appeals Clerk, Hearing," stated that it never received notice as required by Section 409.011, and that it was unable to participate in any proceedings. Further, Employer A states that "[i]n reviewing the [Commission] notice of April 11, 2002, it appears that notification in this matter may have been erroneously sent to an entity called [Employer B] in (city 1), (state 1). [Employer B] is not affiliated with [Employer A]." Employer A's contention is correct; the record reflects that the Commission sent a benefit review conference (BRC) and CCH notice to Employer B rather than to Employer A. Employer A requests that the case be "re-opened and that any award and/or decisions/orders previously entered . . . be set aside because of this lack of the required notice under Section 409.011." The carrier, in a letter dated May 8, 2002, responded that it agreed with Employer A's request for the proceeding to be remanded to a BRC so that Employer A's can have the opportunity to participate. The file does not contain a response to Employer A's letter from the claimant.

DECISION

Reversed and remanded.

The problem with this case is that the Commission has apparently been sending notices and correspondence to the wrong employer. The correct employer, during the appeals process, has notified the Commission of the error and requested it be afforded its rights under Section 409.011. Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3) indicate the procedure whereby "[a] party to a benefit [CCH]" may request review of the hearing officer's decision. Rule 143.3(a). Rule 140.1 defines "party to a proceeding" as "[a] person entitled to take part in a proceeding because of a direct legal interest in the outcome." Employer A was not a party at the CCH. However, on May 2, 2002, the carrier timely filed an appeal based on sufficiency of the evidence. Employer A's letter of May 3, 2002, requested a reopening.

In response to Employer A's May 3, 2002, letter, the carrier, by letter dated May 8, 2002, references another letter from the claimant opposing any reopening of the proceeding. In addition, the carrier agrees with Employer A's request that the case be remanded for "a [BRC] so that [Employer A] can have the opportunity to participate."

Employer A asserts, by letter dated May 3, 2002, that it was denied due process because of lack of notice. Section 409.011(a) provides in pertinent part that the Commission shall mail to the employer a description of:

- (1) the services provided by the commission;
 - (2) the commission's procedures; and
 - (3) the employer's rights and responsibilities under this subtitle.
- (b) The information must include a clear statement of the following rights of the employer:
 - (1) the right to be present at all administrative proceedings relating to an employee's claim;
 - (2) the right to present relevant evidence relating to an employee's claim at any proceeding;
 - (3) the right to report suspected fraud;
 - (4) the right to contest the compensability of an injury if the insurance carrier accepts liability for the payment of benefits;
 - (5) the right to receive notice, after making a written request to the insurance carrier, of:
 - (A) a proposal to settle a claim; or
 - (B) an administrative or a judicial proceeding relating to the resolution of a claim; and
 - (6) the right to contest the failure of the insurance carrier to provide accident prevention services under Subchapter E, Chapter 411.

Review of the record reflects that neither Employer A nor Employer B were present at the CCH. Prior to the presentation of evidence, the carrier requested a continuance of the CCH because the listed employer's (Employer A) name and address were incorrect

and it had not received notice of the CCH. The claimant objected to the request for continuance, asserting that the correct employer had received notice. The hearing officer denied the motion for continuance asserting that two issues in dispute did not apply to the employer and that the remaining issue was determinative on the development of the record. The record does not reflect that any evidence was offered to establish notice or lack of notice to the correct employer.

We review cases involving rulings on motions for continuance made during the hearing under an abuse of discretion standard. In Texas Workers' Compensation Commission Appeal No. 91076, decided December 31, 1991, we noted that a party seeking a continuance must not only establish good cause, but also that the continuance would not "prejudice the rights of the other party." We hold that the hearing officer abused his discretion in denying the carrier's motion for continuance because the hearing officer did not determine whether Employer A had been given notice of the hearing and an opportunity to present evidence pursuant to Section 409.011(b)(5) and (b)(2).

This case is remanded for the hearing officer to determine how to preserve the rights of the parties and the correct employer. Section 410.025(c) provides that the Commission shall send written notice of the BRC to the parties to the claim and the employer. The record does not reflect that Employer A was sent written notice of the BRC. Employer A has indicated that it would agree to return the case to the BRC level to begin the dispute resolution process anew, and the parties may agree to proceed in that manner. In deciding how to proceed, the hearing officer should consider any requests or suggestions from the parties and the correct employer. We would urge the parties to agree to a new BRC and to proceed from that point. In the event that the parties do not agree to have the case returned to the BRC level, it may not be necessary to have another complete hearing. The hearing officer may decide to reopen the hearing and only allow the correct employer to present additional evidence subject to rebuttal by the claimant and the carrier. At such a reopening hearing, the hearing officer must first require that the parties present evidence to determine who the correct employer and carrier were on the date of injury; then, the correct employer needs to be given access to the hearing record, the hearing officer must set a date for exchange of additional evidence by the correct employer to the parties before the next hearing date, and the claimant and the carrier must be given the opportunity for closing argument based on any additional evidence presented.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section

410.202 (amended June 17, 2001). See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **SAFECO INSURANCE COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge